BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ANGEL AQUINO Claimant VS. **FERRELL ROSS** Respondent AND **INSURANCE CARRIER UNKNOWN** Insurance Carrier	)))))))))))	Docket No. 1,053,940

ORDER

STATEMENT OF THE CASE

Claimant requested review of the August 2, 2011, preliminary hearing Order entered by Administrative Law Judge Bruce E. Moore. Robert R. Lee, of Wichita, Kansas, appeared for claimant. Dustin J. Denning, of Salina, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant failed to sustain his burden of proof that he sustained personal injury by accident arising out of and in the course of his employment. The ALJ found that claimant's injuries were the result of horseplay while he was off duty and not performing any activities in furtherance of respondent's interests. Claimant's request for benefits was denied.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the April 21, 2011, Preliminary Hearing and the exhibits; the deposition of Joseph Russell taken May 3, 2011; the deposition of Robert Rodriguez taken June 9, 2011; the deposition of Mark Collier taken June 9, 2011; and the deposition of Rebecca Murillo taken June 9, 2011, together with the pleadings contained in the administrative file.

ISSUES

Claimant first maintains that he did not receive a copy of the ALJ's August 2, 2011, order that had been sent to him by email, and the first time he received the Order was on September 19, 2011, after he called respondent's attorney inquiring about the same.

Claimant filed his Application for Board Review and Docketing Statement on September 26, 2011. Next, claimant requests review of the ALJ's finding that his injuries did not arise out of and in the course of his employment. He contends he was injured when he tripped over a threshold while going from the hotel bathroom to the hotel living room. He argues he was injured while on a business trip which was an integral part of his employment; therefore, the entire undertaking should be considered from a unitary standpoint rather than divisible.

Respondent argues claimant's appeal should be dismissed because the application for review was not timely filed. In the event the Board does not dismiss the appeal, respondent contends the ALJ's finding that claimant's injuries were sustained as a result of horseplay while off duty and not performing any activities in furtherance of respondent's interests should be affirmed. In the event the Board finds claimant's injury occurred during a slip and fall, respondent argues that injuries which occur while an employee is off the clock at his or her hotel are not compensable.

The issues for the Board's review are:

(1) Should claimant's application for review by the Board be dismissed because it was filed out of time?

(2) Did claimant sustain an accidental injury that arose out of and in the course of his employment?

(a) Was claimant's injury the result of horseplay?

(b) If not, would claimant's claim not be compensable because he was not exposed to an increased risk or hazard greater than if he was not in his employment?

FINDINGS OF FACT

At the time of his injury, claimant had been employed by respondent as a welder. Respondent is located in Hereford, Texas. It produces about everything necessary dealing with the feeding of cattle. It also builds facilities to handle the products produced. Equipment is put together in the shop and then shipped out on a truck, and a crew goes to put the product up for the customer. Claimant had worked for respondent for 3 1/2 years. In his job, at times he was sent to remote locations with a crew to build flaking facilities. Sometimes the crew would stay out of town from three weeks to a month and go back to Texas, spend a couple of days with their families, and then load up and go on the road again. While most of claimant's work was done in a remote location outside of Hereford, when he was in Hereford, he worked in the shop building more equipment as needed to take to the next job site.

When claimant was working at a remote job site, transportation expenses, meals and lodging were all paid by respondent. If claimant needed personal equipment, clothing or hygiene items, he would give a statement to his foreman, who would call in an order.

It would be paid for with a company credit card, and the amount of the personal equipment or supplies would be deducted from his paycheck. Claimant said he was required to stay in the same hotel as his coworkers, and generally the crew would stay two to a room.

Claimant said when he was staying at these remote areas, he was free to walk around the hotel or talk to the clerk. He said he was not free, however, to go across the street to watch a game on TV or grab something to eat. He was not allowed to go to a movie or a bar. If someone wanted to buy something at a grocery store, they all went. He was not being paid while he was in the motel room. At the time of his accident, February 22, 2010, claimant had been at a job site in Larned, Kansas, for three days. Two crews from respondent left Texas for Larned, and they were expected to be there for three to four weeks. While in Larned, claimant had no other means of transportation other than the company vehicles.

Claimant said his accident occurred about 8:30 p.m. on February 22, 2010, a time he was off the clock. He said it had been raining that day, and the crew remained in their rooms. Claimant said that evening his roommate, Robert Rodriguez, left the motel to get pizza for the crew. While he was gone, claimant decided to take a shower. After the shower, he shaved and then washed his face. Claimant said he was walking out of the restroom when he tripped over the lip between the bathroom and a small hallway that led to a closet. Claimant explained there was a strip that separated the bathroom floor from the carpeted floor that was 2 1/2 to 3 inches wide and about 3/4 to 1 inch higher than the bathroom floor. Claimant had sandals on and the back of one of the sandals caught on the lip. Claimant testified he fell forward and hit the top of his head on the divider wall between the closet area and the main part of the motel room. He estimated the distance between the bathroom threshold and the divider wall was 1 1/2 to 2 feet.

Claimant said there was no one in the room when he fell. Other crew members were in surrounding rooms. Claimant said after he fell, he lost consciousness. Claimant said he was found by his foreman, Mr. Rodriguez. When claimant woke up, paramedics were inside the room and he was being placed on a stretcher and taken by ambulance to the hospital emergency room. He was accompanied to the hospital by his supervisor, Shawn Malone. Claimant was released from the hospital the next day. He returned to his room and later that day was taken home to Hereford, Texas, by his supervisor. He said the next morning when he woke up, he was unable to move his arms or legs and his wife and daughter took him to a hospital in Amarillo, Texas. He had tests run at the hospital and then saw Dr. Gentry on March 5. Dr. Gentry performed neck fusion surgery on claimant on March 24. Claimant has not returned to work since the accident.

Claimant said he had only gone into that bathroom once or twice during the three-day period he was in Larned before the accident because the crew members were in and out of each others' rooms. He had taken a shower earlier on February 22 in that bathroom, so he had navigated the threshold before. However, he does not recall stepping over the threshold on those prior occasions.

Claimant testified he was not engaging in any roughhousing or horseplay prior to the accident. After claimant listened to the tape of Joseph Russell calling 911, he was asked about Mr. Russell's comment on the tape that there had been roughhousing. Claimant testified that he and Mr. Rodriguez had been arm wrestling earlier. He could not remember what time they arm wrestled, and the arm wrestling had nothing to do with his fall. He said Mr. Russell was not in the room when he was arm wrestling with Mr. Rodriguez.

Joseph Russell worked for respondent from March or April 2009 to March 1, 2010. He was part of a crew in Larned, Kansas, on February 22, 2010, when claimant sustained his injury. He said when he traveled, respondent paid for his food, as long as he ate with the crew. If he did not want to eat with the crew, he was on his own. Respondent did not prohibit the crew from leaving the motel. Typically, though, if he did not want to eat with the crew, he would have to walk, although he was permitted to use the work truck to run to a convenience store or Walmart if needed. Mr. Russell said the crew had arrived in Larned on February 21, the day before the accident. He did not remember that the crew had spent the day in the motel because of the weather. Mr. Russell said he was in Larned for one week of that trip, and he worked every day he was there.

Mr. Russell said he remembered the evening of claimant's accident. He said he and claimant were roommates on that particular trip. Mr. Russell testified that he and Damon Berlanga were working on dinner in the room Mr. Berlanga was sharing with Mr. Rodriguez. He said Mr. Rodriguez was next door in the room claimant and Mr. Russell shared. Mr. Russell said he heard Mr. Rodriguez holler "Get over here," so he and Mr. Berlanga ran over there.[1] When Mr. Russell ran into the room after Mr. Rodriguez called for help, claimant was still on the floor. He said claimant was in front of the beds, between the beds and the TV. He was at least 10 feet away from the threshold of the bathroom. Mr. Russell, Mr. Berlanga and Mr. Rodriguez got claimant onto the bed.

Mr. Russell testified that Mr. Rodriguez told him he and claimant had been wrestling and Mr. Rodriguez had claimant in a headlock. Mr. Rodriguez said claimant just went limp and fell over. Mr. Russell said he wanted to call 911, but Mr. Rodriguez, Mr. Berlanga and claimant did not want him to. Eventually, however, Mr. Russell stepped outside the room and called 911 because claimant was obviously in need of care.

Mr. Russell acknowledged when he made the 911 call, he first told the dispatcher they had been roughhousing, referring to the headlock that Mr. Rodriguez had on claimant. He said he, Mr. Rodriguez, Mr. Berlanga and claimant comprised a crew, and they were all there. He said Mr. Rodriguez and claimant were roughhousing, and since they were a crew, they were all in it together. Later in the 911 call, the dispatcher asked him exactly what happened, and Mr. Russell answered that claimant slipped coming out of the shower or bathroom. Mr. Russell said while he was on the phone with the dispatcher, Mr.

[1] Russell Depo. at 10.

Rodriguez said, "no, he tripped."[2] He said Mr. Rodriguez and Mr. Berlanga told him to say that so no one would get in trouble and so claimant could make a workers compensation claim.

Mr. Russell testified that after the 911 call but before the EMT's arrived, the four of them had a discussion and agreed to say claimant had come out of the shower and had tripped and fallen on the threshold between the bathroom and the carpet. He said the threshold that separates the bathroom tile from the main room was about 1/2 inch high. Mr. Russell said he went along with the story because Mr. Rodriguez was his supervisor and he was several hundred miles from home. Also, he did not want to rat anyone out.

Mr. Russell said claimant had been drinking that night, but he did not know how much claimant had drunk. He said they had not been there long enough for claimant to have had more than one or two.[3]

Mr. Russell could not remember who else, if anyone, showed up in the room when claimant was hurt. He said Shawn Malone, the supervisor, showed up right when the ambulance arrived. When Mr. Malone arrived, Mr. Russell told him the concocted story that claimant slipped and fell coming out of the bathroom.

Mr. Russell said the first time he told anyone the story that claimant had tripped coming out of the bathroom was not true was shortly before his deposition. He had quit working for respondent a week after the incident, and no one asked him about it. He is not in contact with any of the guys who were there. Mr. Russell first talked to Mr. Collier, an insurance agent, who told him to contact respondent's attorney. When he spoke with respondent's attorney the week before his deposition, he told him what had actually occurred in Larned.

Mr. Rodriguez testified the first time he told the truth about what happened in Larned was when he was called into the office of Dave Ibach, respondent's owner/CEO, and Mr. Ibach told him he was getting sued by claimant for an incident when claimant had tripped and fallen. Respondent's vice president, Jim Cwelich, was present in the office at the time. Mr. Rodriguez said he was called into the office because he was the lead man at the job site and because he was there when claimant was hurt. At that point, Mr. Rodriguez told Mr. Ibach what really happened. Mr. Rodriguez was not disciplined by respondent for maintaining the lie about claimant's injury.

Mr. Rodriguez said that the crew all eat together, and no one could take a truck out to get a hamburger. There were two trucks at the job site, and Mr. Rodriguez was

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[2] Russell Depo. at 13.

[3] Claimant testified he only had 1/2 of a beer and that he was sick and vomited that up.

responsible for one and Jesse Medrano, the foreman of the other crew, was responsible for the other. The laborers cannot operate the vehicles without their permission. They would approve someone to use a truck if they needed to go to the store. Mr. Rodriguez said if a laborer on a job site wants to leave to go to the store, they can do that. If a laborer does not want to eat with the crew, the employee can stay back at the hotel. Once the employee is off the clock, he can leave the hotel and walk across the street or down the street.

Mr. Rodriguez testified that claimant had been injured while he and claimant had been horseplaying. At the time Mr. Rodriguez and claimant were wrestling, claimant was a willing participant. He said when a crew is on its own time, sometimes they will horseplay and drink a few beers. He said he and claimant liked to wrestle, and it was just two friends wrestling together, trying to be tough guys. Mr. Rodriguez put claimant in a headlock with claimant's head locked under Mr. Rodriguez' arm. Mr. Rodriguez was going to wrestle claimant to the bed, but claimant told him his neck was hurting, so he let claimant go. Mr. Rodriguez said claimant went back a little as if he was going to fall to the floor, and Mr. Rodriguez helped him sit on the floor. Claimant said he couldn't breathe and asked Mr. Rodriguez to help him up on the bed. Mr. Rodriguez went to get some help, and he got Damon Berlanga. Then Mr. Russell showed up. At the time, Mr. Rodriguez and claimant were in claimant's room, and Mr. Berlanga was in Mr. Rodriguez' room.

Mr. Rodriguez testified he told claimant he was going to call the ambulance, but claimant insisted he was all right. But because claimant appeared to be in a lot of pain, Mr. Russell stepped outside and called 911. Mr. Rodriguez said he, Mr. Berlanga, and Mr. Russell helped claimant up onto the bed.

Mr. Rodriguez said Shawn Malone arrived in Larned just as the ambulance was getting ready to leave. Mr. Rodriguez told Mr. Malone that he found claimant and that claimant tripped, fell and hit his head on a wall while coming out of the bathroom. They told the ambulance people the same thing. Mr. Russell and Mr. Malone went to the hospital with claimant.

Mr. Rodriguez spoke with respondent's attorney the day before his deposition. Respondent's attorney told him what Mr. Russell had testified to, and Mr. Rodriguez agreed with most of Mr. Russell's testimony. But Mr. Rodriguez did not agree that he, Mr. Russell and Mr. Berlanga concocted the trip and fall story. He said claimant came up with that story before the ambulance arrived and everyone went along with him. Mr. Rodriguez said claimant did not want anyone else to get in trouble. Mr. Rodriguez admitted he also did not want to get in trouble.

After the ambulance left, Mr. Rodriguez told Mr. Medrano that claimant had slipped and fallen and was taken to the hospital by ambulance. Tim Olivarez and Sergio Hernandez were told the story by Mr. Medrano. Later that morning, they asked Mr. Rodriguez about the incident, and Mr. Rodriguez told them the story that claimant tripped,

fell and hit his head. The two crews worked at the Larned job site the rest of the week. He stuck to the story all week.

Mark Collier is the president and owner of an independent insurance agency, and respondent is one of its clients. Mr. Collier said respondent was looking for Mr. Russell but the phone number in its file was not a good number. Mr. Collier said he knew Mr. Russell's mother and offered to call her and get a good phone number for Mr. Russell. Mr. Collier called Mrs. Russell and was given a phone number for Mr. Russell. Mr. Collier then gave that number to respondent. Later, Mr. Collier was told by respondent's attorney that Mr. Russell was not returning calls. Mr. Collier told respondent's attorney that he would contact Mr. Russell and ask him to call. Mr. Collier called the number he had given respondent and Mr. Russell answered immediately. Mr. Russell acknowledged to him that he had received some calls, and Mr. Collier asked him to return the calls. Mr. Collier told Mr. Russell to just tell the truth. That was the extent of his involvement in the matter.

PRINCIPLES OF LAW

K.S.A. 2010 Supp. 44-551(i)(1) states in part:

> All final orders, awards, modifications of awards, or preliminary awards under K.S.A. 44-534a and amendments thereto made by an administrative law judge shall be subject to review by the board upon written request of any interested party within 10 days. Intermediate Saturdays, Sundays and legal holidays shall be excluded in the time computation.

K.A.R. 51-18-2 states in part:

> (a) The effective date of the administrative law judge's acts, findings, awards, decisions, rulings, or modifications, for review purposes, shall be the day following the date noted thereon by the administrative law judge.
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> (b) Application for review by the workers compensation board shall be considered as timely filed only if received in the central office or one of the district offices of the division of workers compensation on or before the tenth day after the effective date of the act of an administrative law judge.

Once the legislature has provided the right to an appeal, the minimum essential elements of due process of law must be provided.[4] "[T]he filing of an award is not notice to the parties; it is the mailing of the award and receipt of the award by the parties that constitutes notice."[5]

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[4] *Johnson v. Brooks Plumbing*, 281 Kan. 1212, 1215, 135 P.3d 1203 (2006). See also *Eichelberger v. Price Truck Line, Inc.*, No. 100,370, unpublished Court of Appeals opinion filed June 19, 2009.

[5] *Nguyen v. IBP, Inc.*, 266 Kan. 580, 589, 972 P.2d 747 (1999).

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[6] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[7]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[8]

When a business trip is an integral part of the claimant's employment, the entire undertaking is to be considered from a unitary standpoint rather than divisible.[9]

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[6] K.S.A. 2010 Supp. 44-501(a).

[7] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

[8] *Id.* at 278.

[9] See *Blair v. Shaw*, 171 Kan. 524, 529, 233 P.2d 731 (1951). See also *Halford v. Nowak Construction Co.*, 39 Kan. App. 2d 935, 186 P.3d 206, *rev. denied* 287 Kan. 765 (2008); *Roberts v. Royal Caribbean Cruises LTD*, No. 1,035,841, 2008 WL 5122315 (Kan. WCAB Nov. 24, 2008); *Johnson v. Cohoon Chiropractic*, No. 1,010,150, 2003 WL 22401223 (Kan. WCAB Sept. 18, 2003).

"[T]here appears to be a rational difference between a continuously traveling employee and one who stays in a hotel to reduce the daily commute."[10] "[Claimant's] off-hours activities were not under [respondent's] supervision, and he was not expected to accomplish anything on behalf of [respondent] during his off-time."[11]

"An injury to a nonparticipating employee from workplace horseplay arises out of employment and is compensable under the Kansas Workers Compensation Act."[12]

> In contrast, a participating worker makes a choice to step away from his or her status and responsibilities as an employee to engage in playful but hazardous conduct. Such a worker's resulting injury is not an artifact of that status or those responsibilities; it does not arise out of employment under the Workers Compensation Act.[13]

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[14] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[15]

ANALYSIS

Counsel for claimant first learned of the ALJ's August 2, 2011, Order on September 19, 2011. Claimant filed an Application for Board Review and Docketing Statement on September 26, 2011. The 10-day time limit to appeal the ALJ's Order to the Board was tolled until claimant's counsel received actual notice of the order. Accordingly, claimant's appeal is timely, and the Board has jurisdiction to review the ALJ's Order.

The ALJ's Order makes it clear he did not find claimant's testimony to be credible.

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[10] *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 548, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001)

[11] *Id.* at 547.

[12] *Coleman v. Swift-Eckrich*, 281 Kan. 381, Syl., 130 P.3d 111 (2006).

[13] *Id.* at 389.

[14] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[15] K.S.A. 2010 Supp. 44-555c(k).

This Board Member finds that claimant did not trip and fall as he exited the motel bathroom as alleged. Rather, he was injured while willingly wrestling and roughhousing with his coworker, Mr. Rodriguez. That activity was horseplay. Claimant's accident and injury may have occurred in the course of his employment with respondent because travel was inherent to claimant's job and the accident occurred on a trip necessary for the employment. But because claimant was a willing participant in horseplay when he was injured, his injury did not arise out of his employment with respondent.

CONCLUSION

(1) The Board has jurisdiction of this appeal because the 10-day time period to appeal from the ALJ's Order was tolled until claimant's counsel received that Order.

(2) Claimant's accident and injury did not arise out of his employment with respondent because it was the result of horseplay where claimant was a willing participant.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Bruce E. Moore dated August 2, 2011, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of November, 2011.

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HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Robert R. Lee, Attorney for Claimant
Dustin J. Denning, Attorney for Respondent
Bruce E. Moore, Administrative Law Judge